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# Towards a Bilingual Legal System—The Development of Chinese Legal Language

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## I. INTRODUCTION

English has been the language of the ruling class since Hong Kong first became a British colony in 1842.<sup>1</sup> The exclusive use of English in legislation and judicial proceedings has resulted in “linguistic apartheid” and has alienated Hong Kong’s local population, which is ninety-eight percent ethnic Chinese,<sup>2</sup> from the legal system. Local subjects who are not proficient in English are disadvantaged in their dealings and communications with the government. Most senior government officials are only able to draft official documents in English because they were trained and employed under the British colonial administration. It is reported that even Chief Secretary Anson Chan still prefers to use English in internal meetings when no expatriates are present.<sup>3</sup>

The consequence of Hong Kong’s dual language system is power segregation. Because the law is unavailable in the language of the Hong Kong majority, the English common law system is handicapped. This monolingual system has resulted in the public’s

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1. See Treaty Between China and Great Britain, Aug. 29, 1842, China-Gr. Brit., 93 Consol. T.S. 465; Convention of Friendship, Oct. 24, 1860, China-Gr. Brit., 123 Consol. T.S. 71; Convention Respecting an Extension of Hong Kong Territory, June 9, 1898, China-Gr. Brit., 186 Consol. T.S. 310.

2. See Richard Klein, *Law and Racism in an Asian Setting: An Analysis of the British Rule of Hong Kong*, 18 HASTINGS INT’L & COMP. L. REV. 223, 223 (1995).

3. See Editorial, *A Cultural Change*, S. CHINA MORNING POST, Sept. 13, 1995, at 18.

alienation from the law, leading to inequality and injustice.

The signing of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Joint Declaration)<sup>4</sup> in 1984 triggered the Hong Kong government's flurry of legal reforms. The imminent return of Hong Kong to Chinese rule has caused a dramatic change in Hong Kong's political tide. In 1995, the Hong Kong government published "The Report on the Use of Chinese in the Civil Service" with the Chinese section at the beginning for the first time.<sup>5</sup>

Political and economic reality, as well as cultural pride, have led to the elevation of the Chinese language's status in Hong Kong. Historically, English language schools were considered to be more prestigious than Chinese language schools. Hong Kong residents always considered the mastery of English as essential; knowledge of Chinese, however, was relatively insignificant. In contrast, Hong Kong's primary school curriculum today includes *Putonghua*, China's official language.<sup>6</sup> Even adults are rushing to learn it.<sup>7</sup>

Today, with less than 200 days before the sovereignty change, the question facing the Hong Kong legal system extends well beyond the assertion of the local population's language rights. It has become the increasingly complicated issue of actually implement-

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4. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 23 I.L.M. 1371 [hereinafter Joint Declaration].

5. See Chris Yeung, *Chinese Precedes English in Report*, S. CHINA MORNING POST, Sept. 13, 1995, at 2. In the CIVIL SERV. DIV., HONG KONG GOV'T, REPORT OF THE WORKING PARTY ON THE USE OF CHINESE IN THE CIVIL SERVICE (1995), the Hong Kong government recommended increasing the use of Chinese within the administration, establishing new training programs, revising entry qualifications, and implementing the use of Chinese computer programs. See *id.* Although the report is not a "mainstream" report, it shows that civil servants are increasingly emphasizing the use of Chinese. See *id.*

6. See *Scholars Call for Reform of Chinese Teaching in Hong Kong*, Xinhua English Newswire, Aug. 10, 1996, available in 1996 WL 11051001. The spoken Chinese language has different dialects, but the written language is compatible throughout the entire country. The Chinese language referred to in this Article is Cantonese, which most Hong Kong Chinese speak. The *pinyin*, the Chinese phonetics system, however, is the official Mandarin version for standardization purposes.

7. See Vaudine England, *In Hong Kong, a Sudden Demand for Putonghua Lessons*, INT'L HERALD TRIB., Feb. 13, 1996, at 22.

ing a bilingual legal system.

In its future linguistic evolution, Hong Kong must grow from its purely monolingual legal system under British rule to a bilingual legal system under Chinese sovereignty. Translating English common law into the Chinese language for an essentially non-English speaking region, however, complicates this transformation. Furthermore, the switch from a monolingual legal system to a bilingual one must be completed in the short period of thirteen years (1984-1997). After 1997, Hong Kong faces the task of running a common law legal system in the Chinese language within the broader legal framework of a civil law country.

This Article focuses on the difficulties of implementing Chinese as a legal language in both statutory and case law. The difficulties extend well beyond mere translation problems. To incorporate Chinese as a legal language in Hong Kong's bilingual legal system, Hong Kong must develop a Chinese legal vocabulary that reflects the local legal usage. Creating such a legal vocabulary, however, requires more than translation; it requires awareness of the subtleties of the Chinese language and respect for its cultural characteristics.

Part II of this Article discusses the linguistic background of Hong Kong's legal system. Part III explores the differences between the English and Chinese languages and identifies some current and future issues that impact the shift to a Chinese legal language. Finally, Part IV concludes that the Hong Kong government must remain cognizant of several issues in order to create a successful transition to a local legal system in Chinese and to simultaneously retain the cultural characteristics of the Chinese language.

## II. BACKGROUND

Sources of Hong Kong law include English common law and equity; statutory law, which is comprised of local ordinances; Acts of the United Kingdom Parliament, and Orders in Council; and Chinese customary law. A bilingual legal system in Hong Kong will necessarily entail the right to participate in both legislative and judicial proceedings in either Chinese or English, in addition to providing access to legal materials in both languages.<sup>8</sup>

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8. See Albert H.Y. Chen, 1997: *The Language of the Law in Hong Kong*, 15 H.K.

### A. Legislative Proceedings

The District Board and Legislative, Urban, and Regional Councils only began to use Chinese as an official language in their meetings in 1974.<sup>9</sup> This elevation of the Chinese language was largely the result of a tertiary student campaign in the late 1960s.<sup>10</sup> The student campaign soon gained widespread support and in October 1970 the government responded by appointing a committee to study the matter.<sup>11</sup>

In 1974, the Hong Kong government enacted the Official Languages Ordinance.<sup>12</sup> Section 3(1) of the Official Languages Ordinance provided that "the English and Chinese languages are declared to be the official languages of Hong Kong for the purposes of communication between the Government or any public officer and members of the public."<sup>13</sup> Section 4(1) added, however, that "[e]very Ordinance shall be enacted and published in the English language."<sup>14</sup>

The Official Languages Ordinance began a trend toward the use of Chinese in public administration, but not in the legal system.<sup>15</sup> When the Joint Declaration was signed, however, heightened awareness of the use of Chinese in the legal system was rekindled.

Prior to 1989, all ordinances were enacted and published solely in English.<sup>16</sup> The 1987 amendments to the Official Lan-

L.J. 19, 35 (1985).

9. *See id.* at 21-22.

10. *See id.* at 21.

11. *See id.*

12. Official Languages Ordinance, LAWS OF HONG KONG ch. 5 (1980).

13. *Id.* § 3(1).

14. *Id.* § 4(1).

15. *See Chen, supra* note 8, at 22.

16. In 1988, however, the Bilingual Laws Advisory Committee (BLAC) was established to scrutinize the translated texts that the Law Drafting Division of the Legal Department drafted. In its first two years, the BLAC was very slow in scrutinizing the Chinese text of any legislation. The process suddenly intensified, however, in 1994. As a result, the BLAC had approved approximately 5,400 of 22,000 pages of legislation by the end of March 1994. Between January and April 1995 alone, the BLAC endowed 30 ordinances with authentic Chinese text. By December 1995, the Attorney General announced that the Legal Department had translated into Chinese all ordinances and subsidiary legislation originally enacted in English. Fung Wai-Kong, *Law Translation on Track*, S. CHINA MORNING POST, Dec. 2, 1995, at 5. At the time, there were more than 600 principal ordinances and about 1,000 pieces of subsidiary legislation. *See id.* The

guages Ordinance<sup>17</sup> and the Interpretation and General Clauses Ordinance<sup>18</sup> prescribed the legal framework for the introduction of bilingual legislation. Thus, since 1989,<sup>19</sup> all new principal ordinances—ordinances that do not merely amend existing ordinances—have been enacted and published in both English and Chinese.<sup>20</sup>

### B. Judicial Proceedings

Unfortunately, bilingualism has not extended to judicial proceedings. In comparison to Hong Kong's attempts at developing a bilingual legislative process, developing a bilingual court system has been a more difficult task. This difficulty is due to the lack of bilingual judicial personnel and the sophistication of the English case law system.

Under section 6 of the Official Languages Ordinance,<sup>21</sup> English remains the primary language in the Land Tribunal, the District Court, the High Court, and the Court of Appeal.<sup>22</sup> Nevertheless, the Chief Justice retains discretion to extend the use of Chinese in these courts.<sup>23</sup> In December 1995, Hong Kong's High Court heard its first case in Chinese.<sup>24</sup> The Chief Justice exercised

Legislative Council had declared the authenticity of the Chinese text of 174 ordinances, but the BLAC had not scrutinized the rest of the legislation. *See id.*

17. Official Languages Ordinance, LAWS OF HONG KONG ch. 5 (1987). The Official Languages (Amendment) Ordinance was not implemented until April 1989.

18. Interpretation and General Clauses Ordinance, LAWS OF HONG KONG ch. 1 (1995).

19. There was a two-year gap between the enactment and the implementation of the Official Languages Ordinance. This delay allowed for "trial runs" in the Legislative and Executive Councils, so that members in both Councils would understand the merits of both the English and Chinese texts. For further discussion, see Tomasz Ujejski, *The Future of the English Language in Hong Kong Law, in THE FUTURE OF THE LAW IN HONG KONG* 164, 177 (Raymond Wacks ed., 1989).

20. *See* Official Languages Ordinance, LAWS OF HONG KONG ch. 5, § 4(1) (1989).

21. The Official Languages (Amendment) Ordinance further amended the Official Languages Ordinance in July 1995.

22. *See* Official Languages (Amendment) Ordinance, Ord. No. 51, § 6 (1995). For a discussion of the difficulties with implementing bilingualism in the courts, see The Report of the Working Party on the Use of the Chinese Language in the District Court (Dec. 1993); Interim Report of the Working Party on the Use of the Chinese Language in the High Court (Apr. 25, 1994) (unpublished documents of the Hong Kong Judiciary, on file with the *Loyola of Los Angeles International and Comparative Law Journal*).

23. *See* Official Languages (Amendment) Ordinance, Ord. No. 51, § 5.

24. Sun Er-jo v. Lo Ching, [1996] 1 H.K.C. 1 (High Ct. 1995).

his discretion to use Chinese in *Sun Er-Jo v. Lo Ching* because the case involved numerous Chinese documents dating back thirty years. In 1996, *R v. Kwong Kim Wah*<sup>25</sup> became the first case to be reported in Chinese.<sup>26</sup>

Currently, only proceedings in lower courts, such as the magistrate's courts, juvenile courts, the Labor Tribunal, the Small Claims Tribunal, the Immigration Tribunal, and any inquiry by a coroner, may be conducted in either language.<sup>27</sup> This differentiation between higher and lower courts is based on the belief that higher courts have to deal with complicated legal issues and precedents, which are often in English and have no Chinese translation, while lower courts are more concerned with factual arguments.<sup>28</sup> This differentiation may also reinforce the image, however, that English is the superior language because it is used in *higher* courts. This image is exemplified in the case of *Attorney General v. Tang Yuen Lin*,<sup>29</sup> where the defendant unsuccessfully invoked article 11(2) of the Hong Kong Bill of Rights Ordinance<sup>30</sup> and relied on the authority of *R v. Tse Kim-ho*<sup>31</sup> to challenge the validity of a summons issued only in English.<sup>32</sup> Article II(2)(a) guarantees that anyone who is charged with a criminal offense is entitled "to be informed promptly and in detail in a language which he understands."<sup>33</sup> In *R v. Tse Kim-ho*,<sup>34</sup> the magistrate court ruled that a summons issued only in English to a person of Chinese origin who did not know English would amount to a violation of that person's fundamental right of pre-trial protection and preparation under article II(2)(a) of the Bill of Rights Ordinance.<sup>35</sup> The Court of Appeal, however, overruled this decision in *Attorney General v.*

25. [1996] 2 H.K.C. 161 (Dist. Ct.).

26. *See id.*

27. *See* Official Languages (Amendment) Ordinance, Ord. No. 51, § 5.

28. HONG KONG GOV'T, THE THIRD REPORT OF THE CHINESE LANGUAGE COMMITTEE 10 (1971). For further discussion, see Chen, *supra* note 8, at 24.

29. [1995] 1 H.K.C. 209 (Ct. App.).

30. Hong Kong Bill of Rights Ordinance, LAWS OF HONG KONG ch. 383, art. II(2)(a) (1991).

31. *See Tang Yuen Lin*, [1995] 1 H.K.C. at 210 (citing *R v. Tse Kim-ho*, [1993] 3 H.K.P.L.R. 298).

32. *See id.* at 209.

33. Hong Kong Bill of Rights Ordinance, LAWS OF HONG KONG ch. 383, art. II(2)(a).

34. [1993] 3 H.K.P.L.R. 298.

35. *See id.* at 300.



*Tang Yuen Lin*.<sup>36</sup> Facing the same issue as in *R. v. Tse Kim-ho*, the court ruled that there was no violation of the Bill of Rights Ordinance as long as a person in authority, or even the defendant's own legal advisor, explained the full particulars of the charge to the defendant.<sup>37</sup>

These cases are a far cry from the principle of equality. In fact, they are contrary to the development of a bilingual legal system in Hong Kong. Commentators urge that automatically providing all court documents in both official languages—including charge sheets or indictments, depositions, witness statements, documentary exhibits, pleadings, affidavits, judgment reasons, and orders—is essential for a fair legal system.<sup>38</sup>

Although courts provide translation services, these services are only available for parties and witnesses in the examination stage. Because translations are not available in other stages of court proceedings, the parties may not understand counsels' submissions or even the judgment. Additionally, courtroom observers and jurors are expected to understand English.

### III. THE CHALLENGES AHEAD

Despite efforts to establish bilingualism in all areas, Hong Kong's present legal system is, at best, only partially bilingual. Annex I of the Joint Declaration and article 9 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law)<sup>39</sup> stipulate that executive authorities, the legislature and the judiciary of the future government may use English, in addition to Chinese, as an official language.<sup>40</sup> These provisions imply that Chinese will be Hong Kong's dominant official language after its return to the PRC in 1997. Article 158 of the Basic Law, which vests the final interpretation power of the Basic Law in the PRC's National People's Congress, reinforces this im-

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36. [1995] 1 H.K.C. 209.

37. *See id.*

38. *See Chen, supra* note 8, at 28 & n.46.

39. Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990), *reprinted* in 29 I.L.M. 1519 (1990) [hereinafter Basic Law]. The Basic Law will be Hong Kong's constitution after 1997.

40. *See id.* art. 9, *reprinted* in 29 I.L.M. 1519, 1521 (1990); Joint Declaration, *supra* note 4, annex I, sec. I, at 1373.

plication.<sup>41</sup> Article 8 of the Basic Law specifies, however, that the HKSAR government shall maintain the previously enforced English common law and rules of equity after 1997.<sup>42</sup> This provision is expected because it would be difficult to express thousands of reported cases, dating back hundreds of years, in a language other than English. The development of a Chinese legal language in Hong Kong's legislation and case law will be a truly Herculean effort and may take years to develop.

### *A. Difficulties in the Development of a Chinese Legal Language in Legislation*

Because Hong Kong is a British colony, British legal sources heavily influence its legal literature and ordinances. In the process of adopting English statutes, Hong Kong legislation has inherited the unique usage and expressions of England's legal language, which makes the development of Hong Kong's Chinese legal language difficult. The major difficulties are archaic English expressions and different Chinese and English sentence structures.

#### 1. Archaic English Expressions

One of Hong Kong's major problems in establishing a bilingual legal system is the archaic language that Hong Kong ordinances have imported from English law. For example, many Hong Kong ordinances use the convoluted expression that a person in authority may "from time to time" reconsider a decision.

Another more startling example is section 19 of the Electoral Provisions Ordinance,<sup>43</sup> which concerns disqualification from nomination or election. Section 19(1)(ac) provides: "A person shall be disqualified for being elected or being nominated as a candidate or holding office as a member if he holds any office of emolument *in the gift or disposal of* the Legislative Council."<sup>44</sup> The obvious question is whether there is a distinction between a person holding office "in the gift" of the Legislative Council and a person holding office at the "disposal of" the Legislative Council.

A similar problem exists in section 3 of the Secretary of State

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41. See Basic Law, *supra* note 39, art. 158, reprinted in 29 I.L.M. 1519, 1545 (1990).

42. See *id.* art. 8, reprinted in 29 I.L.M. 1519, 1545 (1990).

43. Electoral Provisions Ordinance, LAWS OF HONG KONG ch. 367 (1995).

44. *Id.* § 19(1)(ac) (emphasis added).

for Defence (Succession to Property) Ordinance,<sup>45</sup> which states “all that *piece and parcel* of ground known and registered.”<sup>46</sup> One issue is whether there is any difference between “piece” of land and “parcel” of land. Another issue is whether there is any difference between “piece and parcel” of land as used in this statute and “piece or parcel” of land as used in other ordinances.<sup>47</sup>

In order to prevent any divergence between the Chinese and English texts, translators may have to include these English archaisms; however, this practice would perpetuate English archaisms and result in linguistic awkwardness. Perhaps a more comprehensive solution would be the re-enactment of archaic English provisions using modern English and subsequent translation of these re-enacted provisions into Chinese.

## 2. Different Sentence Structure

The sentence structure of English legislation also poses a problem in the development of Hong Kong's Chinese legal language. Enormous differences exist between English and Chinese in grammar, syntax, style, and structure. English legal sentences often have a run-on structure and contain numerous commas, but only one full-stop. English sentences also have an adjective clause modifying a subject. Either a conjunctive pronoun, such as “which,” “who,” or “whom,” or a preposition coupled with a relative pronoun may introduce the adjective clause. The use of conjunctions and clauses makes English sentences very long and complex and such long and complex sentences often comprise English laws.

In contrast, the Chinese language has much simpler sentence structure. The translation of complex English sentences into Chinese requires restructuring in the Chinese language; otherwise, the sentence is either incomprehensible or unclear to the reader. Author Albert Chen points out that “[m]uch of the interpretation

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45. Secretary of State for Defence (Succession to Property Ordinance), LAWS OF HONG KONG ch. 193 (1993).

46. *Id.* § 3 (emphasis added).

47. Seventeen ordinances define “lot of land” as “piece or parcel” of land, including the Crown Rent and Premium (Apportionment) Ordinance and the New Territories (Renewable Crown Leases) Ordinance. See Crown Rent and Premium (Apportionment) Ordinance, LAWS OF HONG KONG ch. 125, § 2 (1979); New Territories (Renewable Crown Leases Ordinance), LAWS OF HONG KONG ch. 152, § 2 (1969).

of an English-language statute can turn on the placing of a comma or the ambiguity of words which might not be duplicated in an otherwise accurate Chinese translation."<sup>48</sup> As a result, translators face a difficult task because the Chinese language is usually expressed in terse statements.

A notorious example of unintelligible translation is section 7 of the Bills of Sale Ordinance.<sup>49</sup> The original English section contained twenty-one lines with thirteen commas; the Chinese translation contains ten lines with ten commas, but only one full-stop. This structure is very rare in the Chinese language and, therefore, unintelligible to most readers.

### 3. Conflicts Between Two Equally Authentic Language Texts

Although the translation of English terminology and expressions into Chinese is an intricate task, a more fundamental problem involves the conflict between the meanings of two equally authentic language texts. Article 33 of the Vienna Convention on the Law of Treaties provides: "[W]hen a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32<sup>50</sup> does not remove, the meaning which

48. Chen, *supra* note 8, at 27.

49. Bills of Sale Ordinance, LAWS OF HONG KONG ch. 20 (1986). The Hong Kong Bills of Sale Ordinance was originally based on the United Kingdom Bills of Sale Act, 1878, 41 & 42 Vict., ch. 31. Section 7(b) stipulates:

Every bill of sale shall be duly attested and shall be registered . . . ; otherwise such bill of sale shall—in the case of any other bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all bailiffs and other persons, seizing any chattels comprised in such bill of sale, in the execution of any process of any court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, be deemed fraudulent and void so far as regards the property in or right to possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process, as the case may be, and after the expiration of such 7 clear days are in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process has been issued under or in the execution of which such bill has been made or given, as the case may be.

*Id.* § 7(b).

50. Articles 31 and 32 refer to the ordinary rules of interpretation. See Vienna Con-

best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”<sup>51</sup>

In Hong Kong, section 10B(3) of the Interpretation and General Clauses Ordinance<sup>52</sup> follows this approach. It states: “Where a comparison of the authentic texts of an Ordinance discloses a difference of meaning which the rules of statutory interpretation ordinarily applicable do not resolve, the meaning which best reconciles the texts, having regard to the object and purposes of the Ordinance, shall be adopted.”<sup>53</sup>

This statute provides little guidance on how to locate the “object and purposes” that best reconcile the texts. Accepted international practice is to resort to the *travaux preparatoires*, or documents such as local debates in legislative proceedings and other official documents.<sup>54</sup> Until the landmark case of *Pepper v. Hart*,<sup>55</sup> English common law did not permit reference to a legislative debate in a judicial proceeding. In *Pepper*, the House of Lords endorsed reliance on legislative debates on a restrictive basis. In delivering the majority judgment, Lord Browne-Wilkinson ruled:

[R]eference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria.<sup>56</sup>

The Hong Kong Bill of Rights Ordinance (Bill of Rights)<sup>57</sup>

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vention on the Law of Treaties, *opened for signature* May 23, 1969, arts. 31-32, 1155 U.N.T.S. 331, 362-63.

51. *Id.* art. 33, at 363.

52. Interpretation and General Clauses Ordinance, LAWS OF HONG KONG ch. 1 (1995).

53. *Id.* § 10B(3).

54. N.A. MARYAN GREEN, INTERNATIONAL LAW 173 (3d ed. 1987).

55. [1993] App. Cas. 593 (appeal taken from Eng.).

56. *Id.* at 634.

57. Hong Kong Bill of Rights Ordinance, LAWS OF HONG KONG ch. 383 (1991). The Ordinance is the domestic implementation of the International Covenant on Civil and

provides an intriguing example of an attempt to meet the above guidelines. Section 2(7) of the Bill of Rights exists only in Chinese, but can be translated into English as "any reference of the International Covenant on Civil and Political Rights within the Ordinance refers to the authentic text recorded and documented in the United Nations."<sup>58</sup>

Legislator Karina Lau points out that there are two versions of the Chinese text for the International Covenant on Civil and Political Rights (International Covenant).<sup>59</sup> One is the "Treaty Versions," which was deposited in the archives of the United Nations in 1976.<sup>60</sup> The other is the "United Nations Publication," which the Center for Human Rights of the United Nations published in 1988.<sup>61</sup> Hong Kong adopted the "Treaty Versions" because the Joint Declaration<sup>62</sup> on Hong Kong was signed in 1984—four years before the issuance of the "United Nations Publication."<sup>63</sup>

Nevertheless, the problem of discovering the legislative purposes and objectives may not be solved so easily. Recourse to legislative proceedings may not shed any light on legislative intent if the legislature did not specifically debate the disputed clause or if the legislative intent is obscure.<sup>64</sup> Ultimately, the Legislative Council's intent may remain a mystery.

An additional problem exists where the interpretation of legislation involves an international treaty or where two different legal systems present two sets of jurisprudential rationales. In these situations, a judge may opt for the "plain meaning" of the phrase and refuse to consider the legislative intent. In *Kwan Kong Co. v.*

Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 13, 1976) [hereinafter International Covenant].

58. See Hong Kong Bill of Rights Ordinance, LAWS OF HONG KONG ch 383, § 2(7).

59. See HONG KONG HANSARD, REPORTS OF THE SITTINGS OF THE LEGISLATIVE COUNCIL OF HONG KONG, 1990/91 Sess., pt. 3, at 2321 (June 5, 1991) (speech of legislator Karina Lau).

60. See *id.*

61. See *id.*

62. Annex I, Sec. XIII of the Joint Declaration endorsed the implementation of the International Covenant as applied to Hong Kong through domestic law. See Joint Declaration, *supra* note 4, annex I, sec. XIII, at 1377.

63. See HONG KONG HANSARD, *supra* note 59, at 2321-23 (June 5, 1991) (speech of legislator Karina Lau).

64. MICHAEL ZANDER, THE LAW-MAKING PROCESS 155 (4th ed. 1994).

*Town Planning Board*,<sup>65</sup> for example, the plaintiff sought judicial review of the defendant's decision to rezone his land into a Special Category (Quarry and Mining) land.<sup>66</sup> The plaintiff was absent during the Town Planning Board hearing. One of the plaintiff's contentions was that the Board's decision violated article 10 of the Bill of Rights<sup>67</sup> which states: "All persons shall be equal before the courts and tribunals. In the determination . . . of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."<sup>68</sup>

The issue in *Kwan Kong Co.* was whether a "suit at law" covered proceedings outside a court of law or tribunal.<sup>69</sup> The plaintiff fervently argued that the International Covenant's legislative intent should govern the interpretation of this particular term because article 10 of the Bill of Rights was based on article 14(1) of the International Covenant.<sup>70</sup> Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),<sup>71</sup> a similar international agreement that incorporates the civil law ideology, interprets "suit at law" to include the category of "civil rights and obligations."<sup>72</sup> In *Kwan Kong Co.*, however, the court declined to consider the possible intention and interpretation behind the international treaty.<sup>73</sup> The court preferred to adopt the plain meaning of the expression "suit at law," which is any formal procedure in court.<sup>74</sup> Therefore, article 10 of the Bill of Rights was irrelevant to the plaintiff's case.<sup>75</sup>

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65. [1995] 3 H.K.C. 254 (High Ct.)

66. *See id.* at 254-55.

67. *See id.* at 255.

68. Hong Kong Bill of Rights Ordinance, LAWS OF HONG KONG ch. 383, art. 10 (1991).

69. *See Kwan Kong Co.*, [1995] 3 H.K.C. at 279.

70. *See id.* at 281-305 (legal argument of plaintiff's counsel, Martin Lee, the famous human rights advocate).

71. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

72. *See id.* art. 6(1), at 228. The original version of the European Convention is in French and the term for "suit at law" is *droit et obligations de caractere civil*.

73. *See Kwan Kong Co.*, [1995] 3 H.K.C. at 281-82.

74. *See id.* at 282.

75. *See id.*

Regardless of whether the *Kwan Kong Co.* case is meritorious, legislative "intent" is a malleable concept. Judges have a vast amount of discretion in deciding whether to consider legislative intent, as well as how to interpret it.

The legal dilemma of identifying legislative intent may be characterized as a universal problem, and no hard and fast rule can solve it. Canadian author Michael Beaupré formulated two general rules for the interpretation of bilingual legislation: (1)  $A^e + B^e + A^f \rightarrow A$  and (2)  $A^e_o + B^e + A^f_o \rightarrow B$ .<sup>76</sup> In other words, when one faces an ambiguous provision and finds a common construction within both the English and French versions, he must relate back to that construction and test it against the entire context of the provision before settling upon a particular meaning. Although the Canadian interpretation may involve the intricacies of both the common law and the civil legal systems, it may be helpful for Hong Kong to adopt and modify its approach.

### *B. Difficulties in the Development of a Chinese Legal Language in Case Law*

One of the major reasons for the relatively slow implementation of the Chinese language in High Court proceedings is the difficulty of presenting legal arguments and delivering judgments in Chinese using authorities based on English common law. To date, Hong Kong's High Court has heard only two cases in Chinese—and only due to their special circumstances. The first case was *Sun Er Jo v. Lo Ching*.<sup>77</sup> The plaintiff brought an action against her children, claiming that they were withholding property held in trust for her based on an oral arrangement.<sup>78</sup> The deeds in question were written in Chinese and dated back thirty years.<sup>79</sup> The parties did not understand English, and lawyers did not represent them.<sup>80</sup> Under these circumstances, the Chief Justice chose to

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76. MICHAEL BEAUPRÉ, INTERPRETING BILINGUAL LEGISLATION 5 (2d ed. 1986). A and B stand for possible constructions, i.e., constructions that the words are reasonably capable of bearing; "e" is the English version; "f" is the French version; and "o" is the version subject to objection in light of the entire context of the provision. *See id.*

77. [1996] 1 H.K.C. 1 (High Ct. 1995).

78. *See id.* at 2-3.

79. *See id.* at 40.

80. *See id.*



conduct the trial in Chinese.<sup>81</sup>

The second case, *Ng Ching Man v. Eliza Ng Lai Wah*,<sup>82</sup> addressed the validity of a marriage. If the marriage was valid, the plaintiff and her children would be entitled to a share of the family property left by a member who died intestate.<sup>83</sup> Because the marriage in question was conducted according to Chinese tradition dating back to World War II, the court decided that the arguments on the establishment of Chinese marriage custom and tradition would be presented most effectively in Chinese.<sup>84</sup> Nevertheless, the court admitted frankly that the preparation and delivery of a bilingual judgment was a difficult process, requiring a week's work.<sup>85</sup>

### 1. Absence of Chinese Equivalents

A main factor impeding the use of Chinese in court proceedings is the lack of equivalent English and Chinese terminology. Many English terms simply do not exist in the Chinese language, and many Chinese terms do not have English equivalents. As Professor Johannes Chan noted, "Whenever one changes from one language to another, the immediate problem is to find the appropriate equivalents."<sup>86</sup>

*R v. Kwong Kim Wah*,<sup>87</sup> the first Hong Kong case reported in Chinese, illustrates this problem. The case involved the possession and selling of electrical copying devices for portable phone lines.<sup>88</sup> In the first trial, the interpreter translated the Chinese phrase *jie ma qi* (electronic copying device) to "cloning box" in English.<sup>89</sup> This translation puzzled the expatriate judge, prosecutor, and de-

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81. *See id.*

82. [1994] MP Case No. 2546.

83. *See id.*

84. *See id.*

85. *See The First Time That High Court Judge Is to Deliver Chinese Judgment*, MING PAO DAILY NEWS, Sept. 12, 1996, at A5 (source in Chinese).

86. Johannes M.M. Chan, *The Chinese Language and Legal Education in Hong Kong* (Dec. 19-21, 1986) (unpublished paper, Conference on Language Policy and Language Planning in Hong Kong).

87. [1996] 2 H.K.C. 161 (Dist. Ct.).

88. *See id.*

89. *See id.*

fense counsels because "cloning" refers to asexual reproduction.<sup>90</sup> In this case, consulting dictionaries or glossaries for legal or common technical terms was not helpful because different dictionaries translated the term differently. Due to such translation problems, the defendants claimed undue prejudice and moved for a retrial.<sup>91</sup> At the retrial, the fact that the judge and all the lawyers were Chinese helped to avoid many of the translation problems experienced in the first trial.

The turmoil surrounding the translation of common terms foreshadows the difficulty of translating sophisticated legal concepts, which requires meticulous precision. Many English common law terms do not exist in the Chinese language, such as "fee tail," "fee simple," "hereditament," and "vacant possession" in land law; and "merchantability," "choses in action," and "to rescind a voidable contract" in commercial law. In addition, many real property and personal property concepts cannot be found in the legal vocabulary of civil law jurisdictions like China.

In addition to the lack of Chinese equivalents for English legal expressions, English common law incorporates many foreign expressions that are difficult to translate into Chinese. Common Latin and French expressions used in English common law include *in transitu*, *petit treason*, *in loco parentis*, *autrefois convict*, and *autrefois acquit*. It would be very odd to preserve these foreign terms in a legal Chinese text due to the etymological and cultural differences. Other foreign terms, such as *ejusdem generis*, *cy-pres doctrine*, *profits a prendre*, and *noscitur a sociis* have no Chinese equivalents. Finding simple and precise Chinese terms with the exact nuance of the foreign terms is an extremely difficult task.

If Chinese translations of English common law retain these foreign terms, translators may be tempted to also include difficult English legal terms. To avoid such problems, Hong Kong translators should look to the Canadian experience. In Canada, Latin and other foreign terms are used less often in the French law than in English law. Article 33 of the Drafting Conventions, which the Uniform Law Conference of Canada adopted, guides the usage of

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90. *See id.*

91. *See The First Criminal Case Heard in Chinese*, MING PAO DAILY NEWS, Mar. 12, 1996, at A9 (source in Chinese).

foreign terms in legislation.<sup>92</sup> It states: "Terms from language other than English should be used only if they are generally understood and if there is no equally clear and concise way of expressing the concept in English."<sup>93</sup>

## 2. Difficulties in Translation

The major difficulties of legal translation are: (1) the difficulty of expressing English legal concepts in Chinese, (2) different meanings of legal concepts in different Chinese provinces, and (3) the different meanings of Chinese words in different contexts.

### (a) Difficulty of Expressing English Legal Concepts in Chinese

Translating English laws into Chinese will be very difficult because English synonyms often have similar meanings but carry different implications and nuances, and expressing such subtleties in Chinese is problematic. For example, "ask," "request," "beg," "entreat," "solicit," "implore," and "beseech" are synonymous verbs, but each word has different shades of meaning applicable in different contexts. The Chinese language has only two equivalents for these English verbs: *ken qiu* and *qing qiu*. In addition, the English variants of "fee," "charges," "dues," "costs," "expenses," "reimbursements," and "disbursements" all translate into the general Chinese term *fei yong*.

Two other examples illustrate the difficulty of expressing English legal concepts in Chinese. In Chinese, "pledge," "charge," and "mortgage," are often expressed with the same set of Chinese characters as *di ya* or *kou ya*. Thus, a phrase such as "charge by way of mortgage" creates problems. In another example, "duty" and "liability" are often translated interchangeably as *yi wu* or *ze ren*. Thus, expressing the tort law concept that a party has a "duty" reasonable care, but may not be "liable" due to unforeseeable circumstances presents a problem. Author M.F. Ho suggests expressing "duty" as a "primary obligation" and "liability" as a secondary obligation to solve the problem.<sup>94</sup>

Individuals who create new legal terms must ensure that the

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92. See *Drafting Conventions of the Uniform Law Conference of Canada*, LOOPHOLE (Commonwealth Ass'n of Legislative Counsel, Can.), Aug. 1991, at 27, 37.

93. *Id.*

94. HO MAY FOON, HONG KONG CONTRACT LAW 7 (1995) (source in Chinese).

meaning of the new term is clear. An example of an unclear meaning is the translation of the legal terms "barrister" and "solicitor." In Chinese, "solicitor" is translated as *lu shi*, which means lawyer, but "barrister" is translated as *da lu shi*, which means "big lawyer." Consequently, many people believe that barristers have a higher degree of qualification and a higher status in society even though that is not necessarily true. Creation of new legal terms may require considerable time for testing and finalization of appropriate terminology.

*b. Different Meanings of Legal Concepts in Different Chinese Provinces*

To aid in the translation of English legal concepts, commentators often suggest that Hong Kong should adopt China's legal vocabulary. Because China is a civil law country, however, direct adoption will not easily solve possible linguistic and jurisprudential problems. For instance, under the common law system in Hong Kong, "theft" refers to the dishonest appropriation of property belonging to another with the intent to permanently deprive that person of the property. In China, "theft" refers to the secret appropriation of a large amount of private or public property with the intent of unlawful possession. In both Hong Kong and China, however, "theft" is translated as *dao qie*.

There are additional examples where legal terms have different meanings in different Chinese provinces. For example, in Hong Kong, *huo mian* means "immunity," but in China, it means "diplomatic privilege" in the field of public international law. In addition, in Hong Kong, *yuan ben* means "original copy," but in China, it means "the drafted copy from which the original is prepared." "Original copy" in China is translated as *zheng ben*.<sup>95</sup> Furthermore, in common law Hong Kong and civil law Taiwan, "offer" is translated as *yao yue*. Under common law, however, an offer is revocable unless supported by consideration, whereas under civil law, an offer may be irrevocable even without consideration.<sup>96</sup> The reason for this difference is that consideration is an alien concept in civil law countries.

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95. The examples quoted are taken from ATTORNEY GENERAL'S CHAMBERS, HONG KONG, DISCUSSION PAPER ON THE LAWS IN CHINESE (1986) and Chan, *supra* note 86.

96. BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT 63-67 (2d ed. 1992).

These examples demonstrate that direct appropriation of Chinese legal terms from other jurisdictions may confuse the meanings of legal terms. The same expression may have entirely different meanings in different jurisdictions. Thus, when Hong Kong becomes part of the PRC after 1997, harmonizing the two legal systems may not necessarily be advantageous. It may be easier for Hong Kong to retain both the British and Chinese influences in its history by developing its own legal vocabulary, one which reflects its unique legal culture.

*c. Different Meanings of Chinese Words in Different Contexts*

Direct translation is further complicated because Chinese expressions often carry different meanings, in different contexts. For example, “evade” and “avoid” are both translated as *tao bi*. The legal implications of evading tax and avoiding tax, however, are entirely different. Thus, translators must be very careful in detecting the appropriate meaning for the required context.

In section 167(4) of the Company Ordinance,<sup>97</sup> the definition of “property” includes “property, rights and powers of every description” and the definition of “liabilities” includes “duties.”<sup>98</sup> “Duties” is translated into Chinese as “tax duties,” which is inconsistent with the true meaning of “duties” as “responsibilities.”

English words also have meanings that vary with the context. For example, *prima facie* can mean either “preliminary” or “on the surface.” “Right” can mean “correct,” “justice,” or a “political right.” “Damage” can mean economic harm or physical injury.

Occasionally, Chinese phrases may help to clarify the intended meaning of an English phrase or term. There are at least three Chinese translations for “common law”: *bu cheng wen fa*, *xi guan fa*, and *pu tong fa*. As with most Chinese phrases and terms, choosing which translation of “common law” to use depends on the context. *Bu cheng wen fa* stresses the non-statutory nature of “common law,” *xi guan fa* stresses the customary and case law nature of “common law,” and *pu tong fa* is a literal translation of “common law.” The correct implication and context may be determined simply by looking at the Chinese translation of “common

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97. Companies Ordinance, LAWS OF HONG KONG ch. 32 (1995).

98. *Id.* § 167(4).

law.”

#### IV. CONCLUSION

The development of a bilingual legal system for Hong Kong is a daring and ambitious enterprise. The difficulties inherent in this endeavor are tremendous because both the English and Chinese languages possess their own genius that influences diction and sentence structure. The viability of a bilingual system depends on successfully matching equivalent semantic expressions and bridging legal expressions from both languages.

Although the Hong Kong government has made a tremendous effort in standardizing Chinese legal terms by compiling *The English-Chinese Glossary of Legal Terms (Glossary)*,<sup>99</sup> it is not a comprehensive source. First, the *Glossary* only collects terms from statutory instruments. Second, the *Glossary* cannot provide an exhaustive list of the multiple variations of Chinese terms because the variation of Chinese terms is contextually based. Thus, the Hong Kong government must extend its efforts to restructuring current English laws and focus on creating more detailed and practical guidelines for translators.

When translating ordinances into Chinese, translators should seek not a mere translation, but an authentic Chinese text. To accomplish this goal, Hong Kong may need to reformulate the structure of its English language legislation. For example, run-on sentences may need to be broken down into individual clauses. In addition, new legislation should be drafted in a manner that will facilitate translation into Chinese.

When translating case law, translators should interpret Chinese expressions in conformity with the spirit of English law rather than by reference to linguistic analogies. The direct borrowing of legal terms from China is inadvisable because China has different presuppositions on terms and usage. Facing the unsatisfactory consequences of directly appropriating Chinese legal terms from other Chinese jurisdictions, author Betty Ho urges translators to create a unique set of Hong Kong Chinese symbols (for example

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99. LEGAL DEP'T OF THE H.K. GOV'T, *THE ENGLISH-CHINESE GLOSSARY OF LEGAL TERMS* (2d ed. 1996).

“X”) that can reflect Hong Kong’s legal culture and mentality.<sup>100</sup>

In the long run, revised legal education must accompany the development of a bilingual legal system. Traditionally, law students were trained in English even though they that would spend a significant portion of their future work on non-English-speaking clients. Since 1987, the University of Hong Kong has offered courses in Chinese legal vocabulary, and the City University of Hong Kong has been working on the compilation of “A Chinese Digest of the Common Law” since 1988.<sup>101</sup>

Lawyers and judges may also need to develop their bilingual skills. They must be proficient in both languages in order to develop Chinese common law statutory interpretations. If courts interpret ordinances and the common law in English only, Chinese expressions will never be considered.

Despite the mounting importance of Chinese in the legislature and courts, it is erroneous to believe that English can be discarded in the near future. None of the other former British dominions, which have legal systems wholly or partially based on English common law, have managed to cut the umbilical cord to the common law’s mother tongue. English has continued to play an important role in the legislative and judicial activities of these countries. For example, although English is no longer the official language of Malaysia, India, Pakistan, and Sri Lanka, they continue to use English in the legal field.<sup>102</sup> To maintain the common law in Hong Kong, English must be retained as part of the “meaning-conferring corpus” and as the “meaning-criterion”<sup>103</sup> for the local version. Until a Chinese legal language has fully developed into an autonomous language, it is virtually impossible to envision Hong Kong’s future development of the common law system entirely in Chinese.

The development and assimilation of a new language will take considerable time. The absence of a clear government policy on language should not hinder the attempt to develop a bilingual sys-

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100. HO, *supra* note 94, at 27-28.

101. To the best of the author’s knowledge, the project has not yet been completed.

102. Malaysia became independent in 1957, India in 1949, Pakistan in 1973, and Sri Lanka in 1972. For further discussion, see Chen, *supra* note 8, at 29-35.

103. Kingkui Sin, *The Translatability of Law*, in RESEARCH ON CHINESE LINGUISTICS IN HONG KONG 86, 97 (Thomas Hun-tak Lee ed., 1992).

tem. Hong Kong's success as an international and commercial center is dependent on its pool of bilingual human resources.

Hong Kong's present and future bilingual legal system should be developed with three key principles in mind. First, two texts of laws that communicate equivalent messages in each language should be created. Second, the Chinese text, in order to become authentic, should accurately transmit the spirit and legal effect of the English text. Third, the linguistic and cultural characteristics of the Chinese language should be preserved.

Translation is not merely a mechanical process. It is an art form that conveys concepts and ideologies. The creation of a bilingual legal regime requires more than translation of legal terms. The successful implementation and survival of the bilingual legal system has profound implications for the future legal and political systems of Hong Kong and China after 1997.





